Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-47

In the Supreme Court of the United States

OCTOBER TERM, 1990

BRUCE L. WHITE, JR., PETITIONER

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 29 C.F.R. 1613.513 permits a person who alleges discrimination on the basis of age in federal employment, and who chooses to pursue his administrative remedies before the EEOC, to obtain judicial review of his allegations without first exhausting his administrative remedies.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8
Appendix A	1a
Appendix B	5a

TABLE OF AUTHORITIES

Cases:

Bornholdt v. *Brady*, 869 F.2d 57 (2d Cir. 1989)	5, 7
Castro v. *United States*, 775 F.2d 399 (1st Cir. 1985)	7
EEOC v. *FLRA*, 476 U.S. 19 (1986)	5
Langford v. *U.S. Army Corps of Engineers*, 839 F.2d 1192 (6th Cir. 1988)	7
Purtill v. *Harris*, 658 F.2d 134 (3d Cir. 1981), cert. denied, 462 U.S. 1131 (1983)	7
Rogers v. *Lodge*, 458 U.S. 613 (1982)	5

Statutes and regulations:

Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq*	2
29 U.S.C. 633a(b)	2, 5
29 U.S.C. 633a(c)	2, 6
29 U.S.C. 633a(d)	3, 5
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	4
Rehabilitation Act § 501, 29 U.S.C. 791 *et seq.*	4
Veterans' Reemployment Act, 38 U.S.C. 2021 *et seq.*	4
29 C.F.R.:	
Section 1613.213	2
Section 1613.214	2, 3
Section 1613.215	2
Section 1613.231	2

Regulations—Continued: Page

Section 1613.513 2
Section 1613.513 (1988) 6, 7
Section 1619.214 3

Miscellaneous:

52 Fed. Reg. 41,922 (1987) 6

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ANTHONY M. FRANK, POSTMASTER GENERAL

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 24) is reported at 895 F.2d 243. The decision of the district court (Pet. App. 30) is reported at 718 F. Supp. 592.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1990. The petition for a writ of certiorari was filed on May 29, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] Because the appendices to the petition contain many typographical errors, including several omissions of significant language, we are reprinting the opinion of the court of appeals and the relevant portions of the district court opinion as appendices to this brief for the convenience of the Court.

STATEMENT

1. The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, provides two separate routes by which a federal employee or an applicant for federal employment who believes he has been discriminated against because of his age can obtain relief. First, the aggrieved person may file an administrative claim in accordance with the rules and regulations promulgated by the Equal Employment Opportunity Commission (EEOC) and the employing agency. 29 U.S.C. 633a(b). The person following this route first seeks counseling from an EEOC counselor at the employing agency. 29 C.F.R. 1613.213. If, after counseling, the matter cannot be resolved to the aggrieved person's satisfaction, he may file a formal complaint with the agency. 29 C.F.R. 1613.214.

If the agency denies the complaint, the complainant may then appeal to the EEOC. 29 C.F.R. 1613.215, 1613.231. After the administrative complaint is filed with the EEOC, the complainant may abandon the administrative process in favor of a civil suit. The filing of a civil action automatically terminates the processing of the administrative complaint. 29 C.F.R. 1613.513.[2]

Alternatively, the aggrieved person may bring a civil action in any federal district court of competent jurisdiction without pursuing his administrative remedies at all. The ADEA provides that "[w]hen the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this

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[2] The ADEA contains no express time limit for filing a suit for judicial relief after a complaint has been filed with the EEOC. 29 U.S.C. 633a(c).

section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred." 29 U.S.C. 633a(d).

2. Petitioner was employed by the United States Postal Service for about five months before he resigned his job on March 31, 1985, to seek other employment. His first application for reinstatement with the post office—on September 20, 1985—was denied; petitioner did not seek review of this denial. On May 23, 1986, petitioner again applied for reinstatement; he was again denied employment on June 5, 1986. App., *infra*, 6a.[3]

Following an interview with a Postal Service Equal Employment Opportunity counselor, petitioner filed a formal complaint of discrimination on August 4, 1986. App., *infra*, 6a-7a.[4] After a hearing, an administrative law judge found no discrimination on the basis of race, color, or handicap, but recommended a finding of age discrimination; that recommendation was rejected by the Postal Service, which found that petitioner's reinstatement had not been denied on the basis of his age, color, race, or handicap. App., *infra*, 7a. On November 9, 1987, petitioner filed an appeal with the EEOC Office of Re-

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[3] The local postmaster subsequently explained that petitioner's poor performance during his original employment was the reason for the refusal to rehire him. Pet. 10.

[4] Although petitioner states that he "filed a formal complaint of discrimination with the EEOC on August 4, 1986" (Pet. 10), it appears that he filed his initial complaint properly with his agency. See 29 C.F.R. 1619.214 (initial complaint must be filed with the employee's agency, not with the EEOC).

view and Appeals; on December 22, 1987, before obtaining a ruling by the Commission, he filed a civil action in federal district court. App., *infra*, 7a. On March 30, 1988, the EEOC issued its final decision, affirming the decision of the Postal Service.

3. The district court granted respondent's motion for summary judgment on the ADEA claim.[5] It held that when an ADEA plaintiff chooses to pursue his administrative remedies, he must completely exhaust those remedies before commencing suit in federal court. Because petitioner had filed his suit before the EEOC acted on his appeal, he had failed to exhaust his administrative remedies; the district court therefore refused to consider petitioner's ADEA claim. App., *infra*, 9a-13a. The court of appeals affirmed, "[c]oncluding that the district court correctly decided the issues presented to [it]." App., *infra*, 4a.[6]

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[5] The district court also dismissed petitioner's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Section 501 of the Rehabilitation Act, 29 U.S.C. 791 *et seq.*, and the Veterans' Reemployment Act, 38 U.S.C. 2021 *et seq.* Pet. App. 49-55. Petitioner does not raise any issues relating to those claims in this Court.

[6] The court of appeals specifically agreed that "an ADEA plaintiff who chooses to appeal the employer's determination to the Equal Employment Opportunity Commission (EEOC) must await final action by that agency before filing an action in federal district court." App., *infra*, 2a.

ARGUMENT

1. Petitioner contends (Pet. 18) in this Court for the first time that "[t]he critical element in the analysis of the requirements of administrative exhaustion of all remedies is found in the amendment to 29 C.F.R. 1613.513 (1988)." This argument was not presented to the court of appeals.[7] This Court does not ordinarily address issues that have not been properly presented to the courts below. *EEOC* v. *FLRA*, 476 U.S. 19, 24 (1986); *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982). There is no reason to depart from that practice here.[8]

2. We do, however, agree with petitioner's analysis of the relevant law. There is no statutory or regulatory requirement that a complainant must seek administrative relief from the EEOC before filing suit under the ADEA. While the Act permits the EEOC to enforce the statutory anti-discrimination requirements, it also specifically provides for direct resort to a civil action. 29 U.S.C. 633a(d). Moreover, the Act directs the EEOC to issue rules and regulations governing the available administrative process, "as it deems necessary and appropriate." 29 U.S.C. 633a(b).

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[7] Indeed, in the court of appeals, petitioner "specifically disavow[ed] reliance upon" a recent Second Circuit decision, *Bornholdt* v. *Brady*, 869 F.2d 57, 63 (1989), which explained the significance of the amended regulation. App., *infra*, 2a-3a n.2. Petitioner apparently backs away from his disavowal before this Court, quoting *Bornholdt* at length in the petition. Pet. 18-19.

[8] Since the EEOC denied petitioner's administrative appeal on March 30, 1988, he has now exhausted his administrative remedies. There would accordingly seem to be no reason under the lower courts' analysis why petitioner could not now file a new civil action in district court. See note 2, *supra*.

The ADEA is silent on the precise question at issue here—whether a complainant who has filed an appeal with the EEOC may abandon that appeal before it has been decided and seek direct judicial review. But the EEOC has exercised its regulatory authority to provide the answer to that question. For civil actions, like this one, which are filed after November 30, 1987, 29 C.F.R. 1613.513 (1988) provides that such filing will terminate the processing of the administrative complaint.[9] This regulation clearly contemplates that a person who has filed a complaint with the EEOC may obtain judicial review of the merits of his claim by filing a civil action in district court before he has exhausted his administrative remedies, and the EEOC so interprets it.[10]

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[9] 29 C.F.R. 1613.513 (1988) reads:

> The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

Before its amendment on October 30, 1987 (52 Fed. Reg. 41,922), the provision was to the opposite effect:

> The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

[10] The court below noted in passing that the regulation "says nothing concerning the exhaustion requirement." App., *infra*, 3a n.2. Although that is technically correct, the regulation is evidently based on the assumption that the complainant who files a civil action before administrative review is completed will obtain judicial review on the merits in that action. Otherwise, the termination of administrative review would deprive him of any opportunity to obtain an adjudication on the merits. That is clearly not what the ADEA contemplates. See 29 U.S.C. 633a(c). Indeed, petitioner escapes this dilemma, under the interpretation of the courts below, only because the EEOC for some reason completed its administrative review after petitioner filed his civil action, in

The courts of appeals have been divided as to whether an ADEA complainant who has elected the administrative remedy scheme can nevertheless seek judicial review without completing the administrative process. Compare *Langford* v. *U.S. Army Corps of Engineers*, 839 F.2d 1192 (6th Cir. 1988) (exhaustion of administrative remedies not required); *Bornholdt* v. *Brady*, 869 F.2d 57, 63 (2d Cir. 1989) (same), with *Castro* v. *United States*, 775 F.2d 399 (1st Cir. 1985) (exhaustion required); *Purtill* v. *Harris*, 658 F.2d 134 (3d Cir. 1981) (same), cert. denied, 462 U.S. 1131 (1983). *Castro* and *Purtill* were, however, decided before the amendment of 29 C.F.R. 1613.513 (1988), when the filing of a civil action did not terminate EEOC processing of administrative claims. See note 9, *supra*. The reasoning of *Langford* and *Bornholdt* is consistent with the EEOC's interpretation of the amended regulation.

As noted, the issue of the application of 29 C.F.R. 1613.513 to this case was not presented to the courts below. In addition, petitioner is not foreclosed from seeking judicial review now that the administrative process has been completed. Accordingly, there is no need for this Court to consider the effect of the new EEOC regulation in the first instance.

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contravention of 29 C.F.R. 1613.513 (1988). See note 8, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 89-1739

Summary Calendar

BRUCE L. WHITE, JR., PLAINTIFF-APPELLANT

v.

ANTHONY M. FRANK, U.S. Postmaster General, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Texas

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March 1, 1990

Before WILLIAMS, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:

The plaintiff, Bruce White, challenges the refusal of the United States Postal Service to reinstate him following his resignation from that employer a few months previously. The instant suit alleges that the refusal to reinstate was on account of his race (Caucasian), color (white), handicap (20% disability and back injury), and age (50), in violation of title VII

of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; § 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq.; the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.; and the Veterans Reemployment Act, 38 U.S.C. § 2021 et seq.

In a thorough and able opinion, the district court granted the defendant's motion to dismiss or in the alternative for summary judgment. *White v. Frank*, 718 F.Supp. 592 (W.D.Tex.1989). We are persuaded that the district court reached the correct result and for the right reasons. Accordingly, we affirm, and we adopt the district court's persuasive opinion.

In doing so, we of course adopt its holdings, and specifically (but without limitation) its holding, 718 F.Supp. at 596-97, that an ADEA plaintiff who chooses to appeal the employer's determination to the Equal Employment Opportunity Commission (EEOC) must await final action by that agency before filing an action in federal district court. The district court noted, *id.* at 595, that at least three circuit courts of appeals [1] have so held, leaving only one circuit [2] to have held squarely to the contrary.

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[1] I.e., *Castro v. United States*, 775 F.2d 399, 404 (1st Cir. 1985); *Limongelli v. Postmaster General of the United States*, 707 F.2d 368, 373 (9th Cir. 1983); *Purtill v. Harris*, 658 F.2d 134, 138 (3d Cir. 1981), *cert. denied*, 462 U.S. 1131, 103 S.Ct. 3110, 77 L.Ed.2d 1365 (1983).

[2] I.e., *Langford v. United States Corps of Eng'rs*, 839 F.2d 1192, 1194-95 (6th Cir. 1988). Another circuit now has commented, in dictum, that under amended regulations plaintiffs who, like White, filed suit after November 30, 1987, were not required to wait until an administrative determination has been made. *See Bornholdt v. Brady*, 869 F.2d 57, 63 (2d Cir. 1989). However, the instant plaintiff, in his reply brief on

We acknowledge, as did the district court, that there has been some uncertainty on the matter in this circuit because of language in *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. May 1981), to the effect that "[a]fter the administrative complaint has been filed with the [EEOC], a civil action then may be instituted." However, the district court *a quo* has explained persuasively, 718 F.Supp. at 596-97, why the quoted passage in *Paterson* is dictum, addressing a factual scenario not before the court. Moreover, it is not clear that the *Paterson* panel intended to imply that an EEOC complaint once filed would not also have to be *ruled upon* before a suit could be instituted. The district court also convincingly shows, *id.* at 596, that the majority view is the better reading of the statutory scheme.

We note that the passage in question from *Paterson* was quoted recently in *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1096 (5th Cir.1989). *Irwin* involved a plaintiff who had filed suit *after* receiving an adverse decision from the EEOC. Thus, the court did not comment upon the critical language from *Paterson* or address whether the plaintiff could have filed suit *before* the EEOC had made its determination. As in *Paterson*, the sentence is, at most, dictum.

Recently we have reiterated that when a panel of this court has opined on an issue not before it, "[w]e do not view [such discussion] as precluding our consideration of the issue on the merits the first time it has been squarely presented to us." *Powell v.*

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appeal, specifically disavows reliance upon *Bornholdt*, and the regulation in question, 52 Fed. Reg. 41,922 (Oct. 30, 1987), providing that "the filing of a civil action . . . terminates [agency] processing," says nothing concerning the exhaustion requirement.

Commissioner, 891 F.2d 1167, 1172 (5th Cir.1990). Directly presented now with the issue, we conclude, as did the Ninth Circuit when faced with this issue, that "[t]o withdraw is to abandon one's claim, to fail to exhaust one's remedies. Impatience with the agency does not justify immediate resort to the courts." *Rivera v. United States Postal Serv.*, 830 F.2d 1037, 1039 (9th Cir.1987), *cert. denied*, 486 U.S. 1009, 108 S.Ct. 1737, 100 L.Ed.2d 200 (1988).

Concluding that the district court correctly decided the issues presented to it, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. TEXAS
AUSTIN DIVISION

Civ. No. A-87-CA-877

BRUCE L. WHITE

v.

ANTHONY M. FRANK

July 18, 1989

As Amended Aug. 3, 1989

MEMORANDUM OPINION

NOWLIN, District Judge.

Before the Court is the Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment. The Court, having considered the Motion, as well as all of the responses and replies filed thereafter, in addition to all of the pleadings on file in this matter, is of the opinion that the Motion is meritorious and should be granted.[1]

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[1] On July 7, 1989 the Court entered an Order granting the Defendant's motion, and stating that a more detailed opinion would be forthcoming. This is that opinion.

II. UNDISPUTED FACTS

In this suit, Plaintiff alleges that he was denied reinstatement as a postal employee because of his age and because of a handicap. Plaintiff attempts to raise these claims under the Age Discrimination in Employment Act, the Rehabilitation Act, the Veteran's Reemployment Act, and the conspiracy provisions of 42 U.S.C. §§ 1985(2) and (3).

Based upon the Plaintiff's Complaint and the uncontradicted summary judgment evidence submitted by the Defendant, the Court finds that the following facts are not in dispute: Plaintiff is a 30 year veteran of the United States Air Force. After retiring from the Air Force in 1984, Plaintiff applied for and obtained a position with the United States Postal Service. He held that position from October 13, 1984 until March 31, 1985, when Plaintiff resigned his position to seek other employment. Plaintiff's resignation followed a two week absence from work resulting from a back injury received on the job. His resignation stated that he left the Postal Service to pursue an "opportunity on another job."

Plaintiff reapplied for a Postal Service position on September 20, 1985, but was denied a position. No administrative complaint was ever filed for this denial. Thereafter, on May 23, 1986, Plaintiff again applied for reinstatement as a Postal Service employee. This request was again denied, on June 5, 1986. The Postmaster issued a clarification of the reasons supporting the denial on July 7, 1986. Plaintiff filed a formal complaint of discrimination on August 4, 1986, following an interview with a Postal Service Equal Employment Opportunity counselor. The complaint alleged that Plaintiff was denied rein-

statement on the basis of his race, color, age and physical handicap.

A hearing was held on the complaint on April 30, 1987. The administrative judge found no basis for concluding that the plaintiff had been discriminated against on the basis of race, color or handicap, but found support for the Plaintiff's age discrimination complaint, and recommended a finding of discrimination. The final Postal Service decision was handed down on October 16, 1987, and rejected the administrative judge's conclusions on age discrimination, finding that the Plaintiff's request for reinstatement had not been denied on the basis of the Plaintiff's age, color, race or handicap.

On November 9, 1987, the Plaintiff filed a timely appeal to the Equal Employment Opportunity Commission ("EEOC") Office of Review and Appeals. On December 22, 1987, prior to any decision by the EEOC, the Plaintiff filed this suit. On March 30, 1988, the EEOC issued its final decision, affirming the findings of the Postal Service, finding that the Plaintiff had failed to demonstrate a *prima facie* case of discrimination, and stating that there was not any credible evidence supporting the Plaintiff's claims of discrimination.

III. LEGAL ANALYSIS

A. *Exclusive jurisdiction*

As noted earlier, the Plaintiff has filed this suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633a, the Rehabilitation Act of 1973, 29 U.S.C. § 791, *et seq.*, the Veterans Reemployment Act, 38 U.S.C. § 2021, *et seq.*, and the con-

spiracy provisions of the Civil Rights Act, 42 U.S.C. §§ 1985(2) and (3). The Defendant argues that the exclusive remedy for the Plaintiff's alleged discrimination is the ADEA and the Rehabilitation Act.

Several courts have held that a federal employee who claims age discrimination must proceed with this claim *solely* under the provisions of the ADEA, and that the ADEA provides the exclusive remedy for such discrimination. *See Paterson v. Weinberger*, 644 F.2d 521, 524-25 (5th Cir. 1981). *See also Castro v. United States*, 775 F.2d 399, 404-405 (1st Cir. 1985); *Purtill v. Harris*, 658 F.2d 134, 137 (3d Cir. 1981), *cert. denied*, 462 U.S. 1131, 103 S.Ct. 3110, 77 L.Ed.2d 1365 (1983). The Fourth Circuit has recently reached the same conclusion in a non-federal employee situation. *Zombro v. Baltimore City Police Department*, 868 F.2d 1364, 1369 (4th Cir.1989).

Thus, to the extent that the Plaintiff attempts to allege his age discrimination complaints pursuant to 42 U.S.C. § 1985 or the Veterans Reemployment Act, the claims must be dismissed. Plaintiff's sole remedy for relief from any age discrimination is the ADEA.

The Defendant makes the same argument with regard to Plaintiff's handicap discrimination complaints, claiming that the sole remedy available to Plaintiff is the Rehabilitation Act. *See Prewitt v. United States Postal Service*, 662 F.2d 202, 304 (5th Cir.1981). *Prewitt* holds that a Plaintiff alleging a handicap discrimination claim may raise that claim under either § 501 or § 504 of the Rehabilitation Act. The Court need not address this issue, however, because the Plaintiff's Complaint does not state a claim for handicap discrimination under any statute other than the Rehabilitation Act.

B. *Exhaustion of remedies*

Both the ADEA and Rehabilitation Act contain provisions related to exhaustion of remedies, but the provisions differ to some extent. The Defendant argues that the Plaintiff has failed to exhaust his remedies under either statute, and these claims should be dismissed on that basis.

1. ADEA

When a Plaintiff brings an action under the ADEA he has two choices regarding exhaustion of remedies. First, he can choose to by-pass the administrative track entirely, and by giving notice in a timely fashion to the EEOC, he can head straight to federal court. *See Paterson*, 644 F.2d at 523-24; *see also* 29 U.S.C. § 633a(d). His other option is to pursue his administrative remedies first. If he makes this choice, however, he must completely exhaust his administrative remedies before commencing suit in federal court. *See Purtill*, 658 F.2d at 138; *Castro v. United States*, 775 F.2d 399, 404 (1st Cir.1985); *Limongelli v. Postmaster General of the United States*, 707 F.2d 368, 373 (9th Cir. 1983). *But see Langford v. U.S. Army Corps of Engineers*, 839 F.2d 1192, 1194-95 (6th Cir.1988). Unlike the Title VII process (which is applicable to the Rehabilitation Act), an ADEA Plaintiff may not choose to abandon his administrative claims once he starts down that track. *Purtill*, 658 F.2d at 138.

With respect to the Plaintiff's September 20, 1985 application, Plaintiff never filed an administrative complaint. Thus, his action is proper only if he fulfilled the requirements of 29 U.S.C. § 633a(d). That section requires that at least 30 days prior to filing suit, the Plaintiff must give the EEOC notice

of intent to sue. The notice must also be given no more than 180 days after the alleged unlawful practice occurred. No notice of intent to sue was ever served on the EEOC, and the suit was filed more than two years after the alleged unlawful practice. Thus, with respect to the 1985 hiring decision, Plaintiff is barred from suing under the ADEA. 29 U.S.C. § 633a(d).

With reference to the May 23, 1986 application the Plaintiff chose to follow the administrative process. He began that process by filing a formal appeal with the Postal Service. He pursued the matter further when he appealed the Postal Service's decision to the EEOC on November 9, 1987. On December 22, 1987, prior to any decision on the appeal, Plaintiff filed suit in federal court. The EEOC handed its decision down on March 30, 1988, affirming the Postal Service's findings. Thus, Plaintiff did not complete the administrative process prior to filing suit, and under the cases cited above, the ADEA claims related to the May 23, 1986 application must be dismissed.

Plaintiff argues that in *Paterson* the Fifth Circuit held that an ADEA plaintiff need not completely exhaust his administrative remedies prior to filing suit. He contends that an ADEA plaintiff is free to file an action in federal court at any time after the administrative process is started, and that no final agency action is necessary. In support of this argument, he cites this statement from *Paterson*:

> An employee who believes that he has been discriminated against because of his age has two avenues of relief. He may file an administrative complaint with the employing federal agency, and if the employing agency's determination is

> adverse to him, he may appeal to the Civil Service Commission [2] for administrative review. 29 U.S.C. § 633a(b); *see* 29 C.F.R. §§ 1613.501-1613.521 (1980). *After the administrative complaint has been filed with the Commission, a civil action then may be instituted. 29 U.S.C. § 633a(c), (d).* Alternatively, the employee has the option under the Act to bypass the administrative process either in part or in its entirety and proceed directly to federal court thirty days after notice of intent to sue has been given to the Commission as long as such notice is given "within one hundred and eighty days after the alleged unlawful practice occurred." 29 U.S.C. § 633a(d); *see Hall v. United States*, 436 F. Supp. 505 (D.Minn.1977).

Peterson, 644 F.2d at 523-24 (footnote and emphasis added).

The Court does not agree that this statement supports the Plaintiff's argument. First, the language emphasized above is simply not supported by the language of §§ 633a(c) and (d). Section 633a(d) says nothing about suit being permitted anytime after a complaint is filed with the EEOC. Rather, it states that the requirements of that section must be met when a complaint *is not* filed with the Commission. 29 U.S.C. § 633a(d). Further, § 633a(c) does not even purport to address the requirements faced by a plaintiff that elects to pursue the EEOC remedies provided in § 633a(b). To construe these sections as Plaintiff suggests would effectively read the EEOC provisions of § 633a(b) out of the statute.

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[2] The EEOC is now the agency designated to hear such matters. *See* 92 Stat. 3781.

Moreover, the *Paterson* court stated that if a plaintiff elects to bypass the administrative process *in part*, he is still required to follow the dictates of 29 U.S.C. § 633a(d). The only logical reading of the "in part" language is that it applies to one (like Plaintiff) who commences the administrative process, but does not complete it. As noted earlier, § 633a(d) requires the individual to give the EEOC notice of his intent to sue, and to give such notice within 180 days of the alleged unlawful practice. Plaintiff has not complied with this section.[3]

Most importantly, the Fifth Circuit was not presented with the instant factual situation in *Paterson*. The issue there was whether the Plaintiff had adequately pled his claim under FED.R.CIV.P. 8(a)(2) to avoid a "facial attack" on jurisdiction, as opposed to a "factual attack." *Paterson*, 644 F.2d at 524. Indeed, the court found that the plaintiff had "exhausted all administrative channels then known to him," *id.* at 522, and never discusses a scenario where the Plaintiff abandons the administrative process mid-stream. At best, therefore, that portion of the court's statement emphasized above is *dicta*, and this Court is not bound by it.

As noted earlier, the First, Third and Ninth Circuits have explicitly held that when an ADEA plaintiff commences the administrative process, he must completely pursue his administrative remedies prior to filing suit. *Purtill*, 658 F.2d at 134; *Castro*, 775

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[3] Even if the Court construed the Plaintiff's appeal to the EEOC to be a notice of intent to sue (which would be quite a liberal reading of the appeal), the appeal, filed November 9, 1987, was not filed within 180 days of the alleged unlawful practice, which occurred almost 18 months earlier, on June 5, 1986.

F.2d at 399; *Limongelli*, 707 F.2d at 373. As the Plaintiff notes, the Sixth Circuit has ruled to the contrary, and cited *Paterson* in support of that result. *Langford*, 839 F.2d at 1194-95. As is obvious from the above analysis, the Court finds the reasoning of *Purtill*, *Castro* and *Limongelli* more persuasive on this point, and considers the Sixth Circuit's citing of *Paterson* to be based upon a misreading of that case.

Thus, the Court concludes that an ADEA Plaintiff does not have the choice to abandon his administrative remedies once he has commenced that process, and the reasons for this rule are clear. If the Plaintiff chooses to start that process, it would be grossly inefficient to allow him to abandon it whenever he grows tired of it. For the EEOC procedures to work effectively, and for the system to have integrity, claimants must be required to pursue their administrative remedies to completion, or not pursue them at all. Because the Plaintiff failed to allow the administrative process to come to a conclusion prior to filing suit, his suit must be dismissed for failure to exhaust administrative remedies.

* * * * *

IV. CONCLUSION

Under the undisputed facts it is clear that the Defendant is entitled to dismissal and summary judgment. The facts show that with respect to the claims under the Veteran's Reemployment Act and 42 U.S.C. § 1985(2) and (3), the Complaint fails to state a claim upon which relief may be granted. With respect to the claims under the ADEA and the Rehabilitation Act, the Plaintiff has failed to exhaust

his administrative remedies, and summary judgment is therefore proper.

ACCORDINGLY, IT IS ORDERED that Defendant's Motion to Dismiss, or in the Alternative for Summary Judgment is GRANTED. An appropriate judgment will be entered this date.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20093